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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF OREGON

13 TONYA R. THOMPSON,
14 Plaintiff,

Civil No. 09-6136-AA
OPINION AND ORDER

15 vs.

16 MICHAEL J. ASTRUE,
17 Commissioner of Social Security,
18 Defendant.

19 _____
20 Kathryn Tassinari
21 Brent Wells
22 Harder, Wells, Baron & Manning, P.C.
23 474 Willamette, Suite 200
24 Eugene, Oregon 97401
25 Attorneys for plaintiff

26 Dwight Holton
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1 Seattle, Washington 98104-7075
2 Attorneys for defendant

3 AIKEN, Chief Judge:

4 Claimant, Tonya Thompson, brings this action pursuant to
5 the Social Security Act (the Act), 42 U.S.C. §§ 405(g), for
6 disability insurance benefits under Title II of the Act, and for
7 Supplemental Security Income (SSI) disability benefits under
8 Title XVI of the Act, 42 U.S.C. § 1383(c)(3). Claimant requests
9 judicial review of a final decision of the Commissioner denying
10 her application for disability insurance benefits and for SSI
11 disability benefits. For the reasons set forth below, the
12 Commissioner's decision is reversed and remanded for payment of
13 benefits.

14 **PROCEDURAL BACKGROUND**

15 In August 2006, plaintiff protectively filed concurrent
16 applications for disability insurance benefits and SSI disability
17 benefits. Tr. 117-122. She alleged disability beginning January
18 18, 2006, due to psoriasis, fibromyalgia, and mental impairments.
19 Tr. 11-2, 117.

20 After the Commissioner denied her applications initially
21 and on reconsideration, plaintiff requested a hearing before an
22 administrative law judge (ALJ). That hearing occurred on
23 December 2, 2008. Tr. 21-66. On January 23, 2009, the ALJ
24 issued a decision finding plaintiff not disabled and indicating
25 that she could perform other work existing in the economy. Tr.
26 6-20. On March 20, 2009, the Appeals Council denied plaintiff's
27 request for review of the ALJ's decision. Tr. 1-3. The Appeals
28 Council's denial of review made the ALJ's decision the

1 Commissioner's final decision. 20 C.F.R. §§ 404.981, 416.1481,
2 422.210.

3 Plaintiff then filed a complaint before this court. The
4 relevant period for review begins January 18, 2006 (plaintiff's
5 alleged disability onset date) to January 23, 2009 (date of ALJ's
6 decision).

7 STANDARD OF REVIEW

8 This court must affirm the Secretary's decision if it is
9 based on proper legal standards and the findings are supported by
10 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
11 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
12 mere scintilla. It means such relevant evidence as a reasonable
13 mind might accept as adequate to support a conclusion."
14 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
15 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
16 The court must weigh "both the evidence that supports and
17 detracts from the Secretary's conclusion." Martinez v. Heckler,
18 807 F.2d 771, 772 (9th Cir. 1986).

19 The initial burden of proof rests upon the claimant to
20 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
21 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
22 an "inability to engage in any substantial gainful activity by
23 reason of any medically determinable physical or mental
24 impairment which can be expected . . . to last for a continuous
25 period of not less than 12 months. . . ." 42 U.S.C. §
26 423(d)(1)(A).

27 The Secretary has established a five-step sequential
28 process for determining whether a person is disabled. Bowen v.

1 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520,
2 416.920. First the Secretary determines whether a claimant is
3 engaged in "substantial gainful activity." If so, the claimant
4 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§
5 404.1520(b), 416.920(b).

6 In step two the Secretary determines whether the claimant
7 has a "medically severe impairment or combination of
8 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
9 §§ 404.1520(c), 416.920(c). If not, the claimant is not
10 disabled.

11 In step three the Secretary determines whether the
12 impairment meets or equals "one of a number of listed impairments
13 that the Secretary acknowledges are so severe as to preclude
14 substantial gainful activity." Id.; see 20 C.F.R. §§
15 404.1520(d), 416.920(d). If so, the claimant is conclusively
16 presumed disabled; if not, the Secretary proceeds to step four.
17 Yuckert, 482 U.S. at 141.

18 In step four the Secretary determines whether the claimant
19 can still perform "past relevant work." 20 C.F.R. §§
20 404.1520(e), 416.920(e). If the claimant can work, she is not
21 disabled. If she cannot perform past relevant work, the burden
22 shifts to the Secretary. In step five, the Secretary must
23 establish that the claimant can perform other work. Yuckert, 482
24 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e)-(g), 416.920(e)-(g).
25 If the Secretary meets this burden and proves that the claimant
26 is able to perform other work which exists in the national
27 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.
28

DISCUSSION

At the time of the hearing, plaintiff was 38 years old. Tr. 26. She dropped out of high school in tenth grade. Id. She worked as a caregiver for elderly people and a housekeeper at World Mart. Tr. 28-29. Plaintiff last worked in January 2006. Tr. 28.

The ALJ found that plaintiff had the residual functional capacity to perform light level work; to lift and carry 20 pounds occasionally and 10 pounds frequently; to stand, walk and sit for six hours each over an eight-hour period; to never climb ladders, ropes or scaffolds; to only occasionally climb stairs/ramps, balance, stoop, kneel, crouch or crawl; to only occasionally perform overhead work; and to frequently grip/grasp with both hands or perform any finger activity. Tr. 14. The ALJ found that plaintiff needed a sit/stand option and was limited to the performance of one to three step tasks. Id. The ALJ rejected the opinions of Drs. May and Slatick. Tr. 15. The ALJ concluded that plaintiff was not able to perform her past work, but retained the ability to work as a box filler, warehouse checker or garment sorter. Tr. 18-19.

Plaintiff has a history of psoriasis, back pain and mental illness, dating prior to her onset date. Tr. 206, 234-35, 242, 329. Plaintiff occasionally had to seek emergency treatment for her psoriasis. Tr. 257, 263-64, 267. On July 21, 2005, plaintiff was examined by Dr. S. Jon Denton, a dermatologist. Tr. 211. Plaintiff reported that she had had psoriasis for the past 21 years and it was worsening over time. Id. Dr. Denton diagnosed psoriasis and probable psoriatic arthritis. Id.

1 Plaintiff was referred to a rheumatologist for injectable
2 treatment. Tr. 222-23.

3 In September 2005, plaintiff was examined by Dr. Charles
4 May, a rheumatologist, who recommended Remicade infusions. Tr.
5 281. Over the course of the next several months, Dr. May
6 increased plaintiff's Remicade dose ultimately up to 800 mg per
7 infusion, an amount he described as a "fairly high dose." Tr.
8 274. Dr. May noted that both plaintiff's cutaneous psoriasis and
9 psoriatic arthritis were chronic conditions that would require
10 treatment indefinitely. Tr. 273. Dr. May noted that he had to
11 treat plaintiff "fairly aggressively," and had to increase the
12 Remicade dosage and frequency of her infusions in an attempt to
13 control her disease. Id.

14 On December 16, 2006, plaintiff was examined by an agency
15 physician, Dr. Minhau Zhou, an internal medicine specialist. Tr.
16 356. Dr. Zhou stated plaintiff could stand or walk for six hours
17 in an eight-hour day, and sit without restriction. Tr. 359.
18 Plaintiff could lift/carry 20 pounds occasionally and 10 pounds
19 frequently. Tr. 360. She could only occasionally bend, stoop or
20 crouch due to her back symptoms. Id. Dr. Zhou found that
21 plaintiff had "occasional manipulative limitations on reaching,
22 handling, grasping, and feeling due to the arthritis in her
23 hands." Id.

24 On December 22, 2006, plaintiff was examined by Dr. Rory
25 Richardson, a licensed psychologist. Tr. 365. Dr. Richardson
26 noted that he had previously examined plaintiff in August 2003,
27 at which time her Full Scale IQ was 80, with Verbal IQ at 88, and
28 Performance IQ at 75. Id. Her Working Memory was in the

1 borderline range, and her arithmetic ability was at the 3rd grade
2 level. Id. Dr. Richardson diagnosed plaintiff with Bipolar
3 Disorder NOS; Anxiety Disorder NOS; Pain Disorder with both
4 Psychological Factors and General medical Condition;
5 Polysubstance Dependence reportedly in remission; and Borderline
6 Personality Disorder. Id.

7 In May 2007, Dr. May completed a Medical Release form
8 indicating that plaintiff could not participate in any job-
9 related activities because they would aggravate her psoriatic
10 arthritis and fibromyalgia. Tr. 421. He then wrote a separate
11 letter stating that plaintiff would not work a 40-hour week
12 because it would aggravate both her psoriatic arthritis and her
13 fibromyalgia. Tr. 426.

14 On August 8, 2007, Dr. May increased plaintiff's Remicade
15 dosage to 900 mg per infusion. It was the highest dosage he had
16 ever used on a patient. Tr. 425.

17 In November 2007, Dr. May wrote a letter stating that
18 plaintiff was "not employable" due to her psoriasis and psoriatic
19 arthritis, and that those conditions "are expected and will
20 require treatment indefinitely." Tr. 423.

21 On March 6, 2008, Dr. May examined plaintiff and concluded
22 that her symptoms were "most consistent" with fibromyalgia. Tr.
23 449. Dr. May prescribed Tizanidine, which decreased her muscle
24 spasms, but left her with continued back and neck pain. Tr. 472.
25 In July 2008, Dr. May advised plaintiff that he could not
26 increase her Remicade dosage despite reoccurring and worsening
27 psoriasis. Tr. 467. Plaintiff's treating Nurse Practitioner,
28 Meg Portwood, also wrote a letter stating that plaintiff was

1 unable to work "due to chronic health issues" including
2 psoriasis, psoriatic arthritis, fibromyalgia, and bipolar
3 disorder. Tr. 461. Plaintiff's physical therapist also
4 concluded that plaintiff was unable to work. Tr. 471.

5 In September 2008, Dr. May signed a letter indicating that
6 he had been treating plaintiff's conditions very aggressively
7 with a high dose of Remicade, however, despite this aggressive
8 treatment, plaintiff had active inflammatory arthritis and
9 continued to develop skin lesions. Tr. 458. Dr. May opined that
10 plaintiff would be unable to work 40 hours per week without
11 further aggravating her inflammatory arthritis. Id.

12 In November 2008, plaintiff was examined by Dr. Emil
13 Slatick, a licensed psychologist. Tr. 491. Testing revealed
14 that plaintiff's Full Scale IQ and Performance IQ fell within the
15 borderline range. Tr. 496. Her intellectual functioning fell
16 within the 6th percentile with scores predictive of struggles in
17 academic, training and employment endeavors. Id. Dr. Slatick
18 noted that validity scales indicated that plaintiff was generally
19 honest and forthright when responding to items on the MMPI-2.
20 Id. Dr. Slatick diagnosed plaintiff with Pain Disorder; Anxiety
21 Disorder NOS; Depressive Disorder NOS; Polysubstance Disorder in
22 sustained full remission; Borderline Intellectual Functioning;
23 and Personality Disorder NOS with Borderline Features. Tr. 497.
24 He assigned plaintiff a GAP of 38. Dr. Slatick wrote:

25 The data collected during the course of this
26 evaluation indicated that [plaintiff] is
27 experiencing difficulties in both emotional and
28 behavioral functioning of a nature and severity
sufficient to exert a significant negative impact
across domains of functioning.... [Plaintiff's]
psychological and physical difficulties are

1 longstanding and unlikely to remit in the
2 foreseeable future without a high level of
intervention.

3 Id.

4 Dr. Slatick concluded that plaintiff was unlikely to be
5 successful in employment endeavors at that time. Tr. 498.

6 On November 28, 2008, Dr. Slatick completed a Rating of
7 Impairment Severity Report indicating that plaintiff had moderate
8 restrictions in her activities of daily living, marked
9 restrictions in social functioning and in concentration,
10 persistence and pace. Tr. 489. Dr. Slatick stated that
11 plaintiff had four or more episodes of decompensation due to
12 increases in pain and emotional distress. Tr. 490. On November
13 29, 2008, Dr. Slatick completed a mental residual functional
14 capacity form indicating that plaintiff was markedly limited in
15 her ability to remember locations and procedures, to understand
16 and remember detailed instructions, to maintain attention and
17 concentration, to sustain an ordinary routine, to work in
18 coordination with or proximity to others, to complete a normal
19 workday and workweek, to interact with the general public, to
20 accept instructions and respond to criticism, to get along with
21 coworkers, to maintain socially appropriate behavior, and to set
22 realistic goals. Tr. 499-500.

23 The Vocational Expert (VE) testified that when a
24 hypothetical person required a half hour break every other day
25 above and beyond the normal break schedule, that condition would
26 not be acceptable most employers. Tr. 63. The VE further
27 testified that most employers would not tolerate one to two
28 absences a month on a regular basis. Id. The VE was then asked

1 to consider an additional limitation, that is, no more than the
2 occasional use of hands for either fine or gross manipulation.
3 Tr. 64. The VE testified that such a limitation would be a
4 "barrier" for the jobs she had initially listed. Id.

5 I find that the ALJ erred in rejecting the opinions of Drs.
6 May and Slatick. Dr. Slatick's opinion is not contradicted by a
7 treating or examining doctor; therefore, the ALJ was required to
8 give clear and convincing reasons for rejecting his opinion.
9 Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006). The
10 ALJ's reasons fail to meet this standard. I find no indication
11 that Dr. Slatick based his opinion of plaintiff's mental
12 limitations on anything other than the results of intellectual
13 and personality testing that he administered, as well as a
14 clinical interview he conducted with plaintiff. Tr. 495-96.
15 Next, regarding Dr. Slatick's GAF score of 38, indicating a
16 "major impairment," that is consistent with his diagnosis and
17 conclusion that plaintiff's emotional and behavioral difficulties
18 were of "a nature and severity sufficient to exert a significant
19 negative impact across domains of functioning." Tr. 497. I find
20 the ALJ failed to provide clear and convincing reasons for
21 rejecting Dr. Slatick's opinion, and therefore his opinion will
22 be credited.

23 Similarly, I find the ALJ erred in rejecting the opinion of
24 plaintiff's treating physician, Dr. May. As a treating doctor,
25 his opinion is entitled to controlling weight. Holohan v.
26 Massanari, 246 F.3d 1195, 1202 (9th Cir. 2001). The ALJ must
27 provide "clear and convincing" reasons for rejecting a treating
28 doctor's uncontradicted medical opinion. Id. Further, Dr. May's

1 opinion should be given additional weight as a rheumatologist and
2 specialist in the medical conditions from which plaintiff
3 suffers. Benecke v. Barnhart, 379 F.3d 587, 594 n.4 (9th Cir.
4 2004). The ALJ relied primarily on the opinion of a examining
5 doctor for the agency, Dr. Zhou. Tr. 15. Dr. Zhou examined
6 plaintiff on one occasion for a total of 19 minutes. Tr. 356.
7 According to the record, Dr. Zhou is an internal medicine doctor,
8 and not a rheumatologist. Dr. Zhou did not make any findings
9 that conflicted with Dr. May's, and specifically found that
10 plaintiff did, in fact, suffer from psoriasis and psoriatic
11 arthritis. The ALJ then found that Dr. May's objectivity was
12 questionable and his conclusions were simply advocacy upon
13 plaintiff's behalf. Tr. 15. I find no basis in the record for
14 this conclusion, nor does the ALJ point to any evidence in
15 support. Therefore, Dr. May's opinion, as plaintiff's treating
16 rheumatologist, will be credited and given controlling weight.

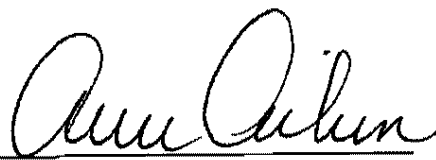
17 When crediting the opinions of both Drs. Slatick and May,
18 the sequential analysis ends at Step Two with a finding of
19 disability.

20 CONCLUSION

21 The Commissioner's decision is not based on substantial
22 evidence. Therefore, this case is reversed and remanded for
23 payment of benefits. This case is dismissed.

24 IT IS SO ORDERED.

25 Dated this 17 day of June 2010.

A handwritten signature in black ink, appearing to read "Ann Aiken", written over a horizontal line.

Ann Aiken
United States District Judge

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